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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/623,055	07/18/2003	Dana K. Richard	2696	3971
7590	12/14/2004		EXAMINER	
Beck & Tysver, P.L.L.C. Suite 100 2900 Thomas Avenue S. Minneapolis, MN 55416			MILLER, CRAIG S	
			ART UNIT	PAPER NUMBER
			2857	

DATE MAILED: 12/14/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/623,055	RICHARD ET AL.	
	Examiner	Art Unit	
	Craig Miller	2857	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 29 December 2003.
- 2a) This action is **FINAL**. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-12 is/are pending in the application.
 - 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1-12 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on 18 July 2003 is/are: a) accepted or b) objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 - a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) Notice of Informal Patent Application (PTO-152)
- 6) Other: _____

1. The following is a quotation of 35 U.S.C. § 103 which forms the basis for all obviousness rejections set forth in this Office action:

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Subject matter developed by another person, which qualifies as prior art only under subsection (f) or (g) of section 102 of this title, shall not preclude patentability under this section where the subject matter and the claimed invention were, at the time the invention was made, owned by the same person or subject to an obligation of assignment to the same person.

2. Claims 1-12 are rejected under 35 U.S.C. § 103 as being anticipated by Scarlat *et al.* (6,477,483).

As to claims 1, 7, 8, 11 and 12, Scarlat *et al.* discloses a remotely controlled (col. 3 lines 10+) file or web server (col. 4 lines 35+) for simulating actual traffic patterns across a network system (col. 3 lines 30+), including setting goals (fig 2 item 2A) and running the network under loads to receive system performance data and optionally running the test again after further system development (col. 6 lines 44+). Scarlat *et al.* discloses that it is known to monitor network performance at selected times under normal traffic loads (col. 2 lines 1+). Scarlat *et al.* does not specify that the goal should be determined from the previous simulation test. Because Scarlat *et al.* teaches that load test should be performed during system development, because the analysis of test data is taught to be used to improve the system and because Scarlat *et al.* allows for test implementation on a live network (col. 4 line 44, “*preferably a staged server*”) it would have been obvious to one of ordinary skill in the art at the time the invention was made to include within the test system of Scarlat *et al.* such continuing tests on live networks so as to receive the expected benefits derived there from such as reduced cost by limiting the need for staged server service fees absent a showing of synergistic effect or unexpected results from any particular claimed combination.

Claim 3 is directed towards emulating a production environment. Scarlat *et al.* discloses such in col. 1 lines 32+.

Claim 4 is directed towards varying the system load. Scarlat *et al.* discloses such in fig. 2 item 4A.

Claim 6 is directed towards loop tests. Scarlat *et al.* discloses a real world simulating load test but does not specify that the scripts should include implemented loops. The Examiner takes notice that loops are well known for implementing system tests. Because Scarlat *et al.* suggest network tests and because loop test are known load test methods, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include within the test system of Scarlat *et al.* such loop tests implementation so as to receive the expected benefits derived there from such as increased system simulation quality absent a showing of synergistic effect or unexpected results from any particular claimed combination.

Claims 2, 5, 9, 10 are directed towards test scheduling. Scarlat *et al.* discloses occasional load testing during development and that it is known to monitor network performance at selected times under normal traffic loads (col. 2 lines 1+). Because Scarlat *et al.* discloses that it is known to perform system monitoring on any scheduled basis (top of col. 2), because Scarlat *et al.* teaches continuing load test and because it is well known to perform load testing in general on network systems, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include within the test system of Scarlat *et al.* such continuing and scheduled tests on live networks so as to receive the expected benefits derived there from such as improved real world traffic and load capability analysis of the network absent a showing of synergistic effect or unexpected results from any particular claimed combination.

3. The drawings are objected to because figures 4-6 include illegible characters (items numbers [18], [48] and [46]) and because the empty diagram boxes in figures 1, 2a, 2b and 3 are impermissible under 37 CFR §1.83(a) which recites as follows:

"The drawing in a nonprovisional application must show every feature of the invention specified in the claims. However, conventional features disclosed in the description and claims, where their detailed illustration is not essential for a proper understanding of the invention, should be illustrated in the drawing in the form of a graphical drawing symbol or a labeled representation (e.g., a labeled rectangular box)." (Emphasis added by Examiner)

The empty diagram boxes found in Figures 1, 2a, 2b and 3 (such as [12] and [24]) of the drawings must be labeled with an appropriate descriptive phrase in addition to the reference legend all ready present. Appropriate correction is required.

Replacement drawing sheets including the correction are required in reply to the Office action to avoid abandonment of the application. The objection to the drawings will not be held in abeyance.

4. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Amalfitano et al. (5,303,166) discloses network benchmarking.
Chen et al. (5,812,780) discloses assessment of server application performance.
Bromberg et al. (5,819,066) discloses benchmarking a database server.
Welter et al. (6,138,157) discloses testing a website.
Marullo et al. (6,157,940) discloses stress testing a web server.
Straathof et al. (6,167,534) discloses system load testing using loops.
Boyd et al. (6,317,787) discloses analyzing web server log files.
Rowe (6,324,492) discloses server stress test simulations.
Weinberg et al. (6,360,332) discloses server functionality testing.
Sweet et al. (6,519,714) discloses evaluation of computer resources.

5. Any inquiry concerning this communication or earlier communications from the Examiner should be directed to Craig Steven Miller whose telephone number is (571) 272-2219. Central facsimile services are now available at (703) 872-9306.

The Examiner can normally be reached on Mondays through Thursdays from 6:30am-2:00pm EDT. Should repeated attempts to reach the Examiner be unsuccessful, the Examiner's Supervisor, Marc Hoff may be reached at (571) 272-2216.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the Private PAIR system, see <http://pair-direct.uspto.gov>. Should you have any questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Craig Steven Miller (ss)
09 December 2004


KATHICK ASSOUAD
PRIMARY EXAMINER